The Miller decision: Legal constitutionalism ends not with a bang, but a whimper

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Article 50(1) of the Treaty on European Union (TEU) provides that

> *"Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements."*

It was therefore a requirement of EU law that the United Kingdom identify just what the "United Kingdom constitution" required to constitute a decision to leave the EU. The United Kingdom government's position was that it could simply rely upon the foreign affairs prerogative to make such a decision and unilaterally begin the process for the secession of the United Kingdom from the EU. The Supreme Court, by an 8-3 majority, disagreed. In a single, though apparently multi-authored, opinion the majority (Lord Neuberger, Lady Hal, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson and Lord Hodge) ruled (at para 122):

> *"The essential point is that, if, as we consider, what would otherwise be a prerogative act would result in a change in domestic law, the act can only lawfully be carried out with the sanction of primary legislation enacted by the Queen in Parliament."*

In three individually authored separate opinions Lords Reed, Carnwath and Hughes set out their reasons for dissenting from this conclusion. All three dissenters expressly agreed with the majority's approach on the devolution issues in the case and added no independent analysis to this. The Supreme Court was, therefore, unanimous in its treatment of the devolution arguments which had been aired before it, finding in favour of the United Kingdom Government's analysis (which was supported by the Attorney General for Northern Ireland) and rejecting the positions taken by the Scottish and Welsh Governments, who had not taken an active part in the proceedings before the (English) Divisional Court, but who were permitted to intervene on the appeal from the Divisional Court to the Supreme Court. The court held that nothing in any of the devolution statutes required that the consent of any of the devolved legislatures be obtained before the relevant legislation is enacted by the United Kingdom Parliament.

This was a difficult and highly politically sensitive case for the court. But despite, or perhaps because of, their unanimity on the devolution issues, the Supreme Court's treatment of these matter is somewhat troubling. The devolution aspects of the United Kingdom constitution appear to have been seen by the court almost as an unwelcome distraction from the main event. Two cases from Northern Ireland (*McCord* and *Agnew and others* were heard with the *Miller* appeal. But counsel for the claimants in these Northern Ireland cases were permitted only 30 minutes to share between them for oral submissions in the four days which the Supreme Court had otherwise set aside allocated to hear oral argument from the litigants, interested parties and interveners who had participated in the English Divisional Court proceedings. The result is that none of the judgments from the court – whether of the majority or in dissent – appeared to rise to the challenge of arguments for pluralism as essential for the proper understanding of the constitutional law of the United Kingdom, understood as a State of Nations with quite separate constitutional histories and as Union maintaining distinct constitutional traditions. Instead, at paragraph 41, the majority judgment simply refers to "seminal events" in the history of the relationship among "the three principal organs of the state, the legislature (the two Houses of Parliament), the executive (ministers and the government more generally) and the judiciary (the judges)" and notes that

> *"a series of statutes enacted in the twenty years between 1688 and 1707 were of particular legal importance. Those statutes were the Bill of Rights 1688/9 and the Act of Settlement 1701 in England and Wales, the Claim of Right 1689 in Scotland, and the Acts of Union 1706 and 1707 in England and Wales and in Scotland respectively. (Northern Ireland joined the United Kingdom pursuant to the Acts of Union 1800 in Britain and Ireland). … Parliamentary sovereignty is a fundamental principle of the UK constitution, as was conclusively established in the statutes referred to."*

It cannot be correct to say that "Parliamentary sovereignty" was *established* in these statutes, as if pre-Union Scottish and English Parliaments could simply bootstrap themselves (or their successor, the post 1707 United Kingdom Parliament) into sovereignty. The Bill of Rights 1688/9 and the Scottish Claim of Right 1689 are certainly predicated on the *primacy* of the pre-Union English Parliament and the pre-Union Scottish Parliament over the English and Scottish Crowns respectively; but these two enactments are premised, if anything, on claims of *popular* sovereignty in their claims to justify the deposition of the monarch. In any event, the Supreme Court presumes what, at the very least, should have been argued for – namely that the 1707 Union was no revolutionary or foundational moment but that, instead, there was and is a constitutional continuity between pre-Union institutions of government *in England* and those of *the United Kingdom* after the Union. It assumes either that the Scottish Crown and the Scottish Parliament prior to 1707 had the same attributes and stood in the same relationship to one another as did the English Crown and English Parliament (which is historically debatable), or that such differences from the English position as existed in Scotland were *erased* by the 1707 Union. On this latter view in 1707 Scotland was, from a constitutional perspective (like Wales had been before it), simply subsumed into the realm and constitutional traditions of England. There is some support for this view: in *Macgregor v Lord Advocate*, 1921 SC 847 the Lord Ordinary (Lord Anderson) observed (at p 848) that "the constitution of Scotland has been the same as that of England since 1707 [and] there is a presumption that the same constitutional principles apply in both countries." But there is authority to the opposite effect: in *MacCormick v. Lord Advocate*, 1953 SC 39, for example, Lord President Cooper stated that "the principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law." As a constitutional court for the United Kingdom tasked with ascertaining the constitutional law of the United Kingdom, the Supreme Court should have at least adverted to these other constitutional traditions within the polity and, for example, explained if and how **Lord Steyn was wrong when in *Jackson v. Attorney General* [2006] 1 AC 262 at para 102 he referred to the "**settlement contained in the Scotland Act 1998" as pointing to a "divided sovereignty" in these islands and observed **that**

> *"The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism."*

And just how was Lord Hope in error when he in stated in the same case **at para 104** that

> *"Our [United Kingdom] constitution is dominated by the sovereignty of Parliament. But Parliamentary sovereignty is no longer, if it ever was, absolute. It is not uncontrolled in the sense referred to by Lord Birkenhead LC in McCawley v The King [1920] AC 691, 720. It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified. … [T]he concept of a Parliament that is absolutely sovereign is not entirely in accord with the reality."*

If the treatment of the competing lines of Scottish referenced authority and tradition is under-developed, the Supreme Court's approach to the constitutional history of Northern Ireland would also have benefitted from a deeper analysis. No acknowledgment is made of the divided and divisive legacy of the Glorious Revolution in Ireland: celebrated, on the one hand, by Loyalist marchers proclaiming it a victory for Protestant liberties; bitterly regretted by others as marking an end to James II and VII experiment in political toleration and equality of treatment for his Catholic subjects. And "Northern Ireland" did *not join* the United Kingdom pursuant to the Acts of Union 1800, as Supreme Court would have it. Instead, the United Kingdom of Britain and Ireland was *created* by the Acts of Union 1800 which were passed by the Westminster and Dublin Parliaments. The Proclamation of the Irish Republic which was read out from the steps of the Dublin General Post Office on Easter Monday 1916 sought to repudiate this Union in the name of (Irish) popular sovereignty, declaring "the right of the people of Ireland to the ownership of Ireland and to the unfettered control of Irish destinies, to be sovereign and indefeasible". On 6 December 1921, following over five years of civil unrest and military conflict in Ireland, there were signed in London by representatives of Great Britain on the one hand and of Ireland on the other (though when and how Great Britain and Ireland had again become distinct entities in international law is not clear) "Articles of an Agreement for a Treaty between Great Britain and Ireland". The Westminster (Imperial) Parliament then enacted the Irish Free State (Agreement) Act 1922 and the Irish Free State Constitution Act 1922, giving this British-Irish Treaty, and the Irish Free State Constitution, the force of domestic law: see *Moore v. Attorney General for the Irish Free State* [1935] AC 484, JCPC. Clause 11 of the British-Irish Treaty gave the Parliament of Northern Ireland (which had been brought into being as a devolved legislature by the Government of Ireland Act 1920) one month from the date of these Acts coming into force to decide whether the territory of Northern Ireland ("as determined in accordance with the wishes of the inhabitants, so far as may be compatible with economic and geographic conditions") should remain in, or opt out from, the Irish Free State. Stormont duly exercised this opt out. So it was *this* decision, by a devolved Parliament sitting in Belfast, which created the present United Kingdom of Great Britain and Northern Ireland. This *newly formed* United Kingdom's relationship with the rest of Ireland remains as set out in the Ireland Act 1949 which, in Section 1(1) "recognized and declared that the part of Ireland heretofore known as Eire ceased, as from 18 April 1949, to be part of His Majesty's dominions" but declared in Section 2(1) that "notwithstanding that the Republic of Ireland is not part of His Majesty's dominions, the Republic of Ireland is *not* a foreign country for the purposes of any law in force in any part of the United Kingdom".

And even within the English constitutional tradition, Blackstone speaks of "civil liberty" and of *popular* rather than Parliamentary sovereignty as foundations of the "British constitution" when discussing the constitutional limitations it places on the prerogative powers of the "king of England" (sic). He notes at the outset of Chapter 7 "Of the King's Prerogative" in Book 1 of his 1765-1769 *Commentaries on the Laws of England* that:

> *"one of the principal bulwarks of civil liberty, or (in other words) of the British constitution, was the limitation of the king's prerogative by bounds so certain and notorious, that it is impossible he should ever exceed them, without the consent of the people, on the one hand; or without, on the other, a violation of that original contract, which in all states impliedly, and in ours most expressly, subsists between the prince and the subject."*

More recently yet, in *Moohan v. Lord Advocate* [2014] UKSC 67 [2015] 1 AC 901 Lord Hodge (in a majority judgment with which Lord Neuberger, Baroness Hale Lord Clarke and, Lord Reed agreed) stated at §35:

> *"I do not exclude the possibility that in the very unlikely event that a parliamentary majority abusively sought to entrench its power by a curtailment of the franchise or similar device, the common law, informed by principles of democracy and the rule of law and international norms, would be able to declare such legislation unlawful."*

None of this complex multi-national constitutional history – and the implications it might have for the theory and

practice of sovereignty in the United Kingdom, whether Parliamentary or popular – appears to have been considered by the Supreme Court in *Miller*. Instead the Supreme Court's reasoning proceeds on the assumption that the 19th century English constitutional tradition as formulated/invented by Dicey – the mythistory of England, as it may be termed – is the fount and only origin of the contemporary United Kingdom constitution. From the terms of the Supreme Court judgment, while the United Kingdom constitution may contain *presumptions* (for example, that specific rather than general statutory words are needed for the United Kingdom Parliament to override fundamental rights: para 87) it contains only two definite *rules*, namely that:

1. > *The United Kingdom Parliament has "the right to make or unmake any law whatsoever; and further, no person or body is recognised by the law as having a right to override or set aside the legislation of Parliament; and, further, that no person or body is recognised by the law of England (sic) as having a right to override or set aside the legislation of Parliament": para 43, quoting and approving Dicey Introduction to the Study of the Law of the Constitution (8th ed, 1915), page 38*

2. > *"Proceedings in [the pre-1707 Union English] Parliament ought not to be impeached or questioned in any Court or Place out of Parliament" (para 145, citing Article 9 of the English Bill of Rights 1688/89.*

On this reading of the principle of the sovereignty of the United Kingdom Parliament, the court's dismissal of the arguments raised by the Northern Ireland claimants and by the Scottish and Welsh Governments about the need to involve the peoples, legislatures and governments of all parts of the Union in any decision for the UK to leave the EU, is easy and inevitable, yet unconvincing and unsatisfying. The majority states (at para 129) that

> *"When enacting the EU constraints in the NI Act and the other devolution Acts, [the Westminster] Parliament proceeded on the assumption that the United Kingdom would be a member of the European Union. That assumption is consistent with the view that [the Westminster] Parliament would determine whether the United Kingdom would remain a member of the European Union."*

Yet, surely, it is equally consistent with the view that the *Parliaments* of the United Kingdom should properly determine whether the United Kingdom would remain a member of the European Union ? The majority judgement continues (at paras 129-30):

> *"Within the United Kingdom, relations with the European Union, like other matters of foreign affairs, are reserved or excepted in the cases of Scotland and Northern Ireland, and are not devolved in the case of Wales …. Accordingly, the devolved legislatures do not have a parallel legislative competence in relation to withdrawal from the European Union."*

But no-one was arguing that the devolved legislatures had competence to pass their own legislation in the sphere of international relations or foreign affairs. The issue was whether the devolved legislatures (whose electorates encompass EU citizens from other Member States settled here) *together with* the United Kingdom Parliament had the right, *as a matter of United Kingdom constitutional law and principle*, to be involved in the decision that the United Kingdom leave the European Union. And while accepting (at para 130) that "the removal of the EU constraints on withdrawal from the EU Treaties will alter the competence of the devolved institutions unless new legislative constraints are introduced", the majority summarily dismissed, as inconsistent with its understanding of the sovereignty of the United Kingdom Parliament, the Scottish and Welsh Governments' arguments that the statutory requirement for the United Kingdom Parliament to seek the consent

of the devolved legislatures when legislating with regard to devolved matter could *ever* be legally enforceable, let alone with regard to any legislation concerning the withdrawal of the United Kingdom from the European Union.

The paradox of such a doctrine of untrammelled sovereignty is that the Westminster Parliament has no *Kompetenz-Kompetenz* – it cannot bind its successors. How then to account for those statutory provisions which appear to do just that ? Examples of statutory provisions which look, on their face, to be creating new constitutional rules which future United Kingdom Parliaments are *legally obliged* to respect within the context of a devolved United Kingdom are:

- Section 63A(1) of the Scotland Act 1998 (SA) which states that

> *"The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements".*

- Section 63A(3) SA which states that

> *"it is declared that the Scottish Parliament and the Scottish Government are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum."*

- Section 1(1) of the Northern Ireland Act 1998 (NIA) which provides

> *"It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll*

- Section 28(8) SA which provides that

> *"But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament."*

Clauses 1 and 2 of the Wales Bill 2016-2017, which at the time of writing was still before the United Kingdom Parliament, contains substantially identical provisions as Sections 28(8) SA and 63A SA. These clauses speak of the National Assembly for Wales and the Welsh Government "as a permanent part of the United Kingdom's constitutional arrangements …. not to be abolished except on the basis of a decision of the people of Wales voting in a referendum" and also confirm that that "the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the [Welsh] Assembly".

These references to the permanence of the devolved institutions and to the United Kingdom Parliament being unable to abolish them without the consent of the relevant *demos* – whether "*the people of Scotland ",* "a *majority* of *the people of Northern Ireland"* or "*the people of Wales"* – expressed through a referendum, rather looks like a recognition with the United Kingdom constitution of popular sovereignty, at least within the Celtic fringe. Yet the Advocate-General for Scotland, who presented argument on the devolution aspects in *Miller* on behalf of the United Kingdom government, dismissed these statutory provisions as no more than "self-denying *ordinances*" which did not token any binding of future United Kingdom Parliaments. On the Supreme Court's analysis, however, they are not even that. Relying on past case law concerning constitutional conventions which have not been given the force of law the majority states (at 144) that "It is well established that the courts of law cannot enforce a political convention" and declares (at 146) that "judges therefore are neither the parents nor the

guardians of political conventions; they are merely observers." It makes no difference to the court that, in the devolution context, conventions have been written into statute. This is described by the majority (at para 144) to constitute no more than "legislative recognition" of a "political convention" which "operates as a *political* restriction on the activity of the UK Parliament". This is completely circular, however. Because the only hard and fast *rule* of the United Kingdom constitution which the Supreme Court is prepared to recognise is that the United Kingdom Parliament cannot bind its successors, when the United Kingdom Parliament says it is binding its successors and is laying down future binding constitutional rules in the plain language of the devolution statutes, the Supreme Court says it is not.

So we have another paradox, or perhaps simply another logical incoherence, that in defence of its constitutional vision of the untrammelled sovereignty of the United Kingdom Parliament, the Supreme Court claims a right effectively to override or set aside the legislation of Parliament by "reading down" clear statutory provisions so that they are said *not* to be constitutive of binding legal rules, but simply expressions legally unenforceable political aspirations. Having so downgraded the statutory provisions the majority then piously concludes (at para 151) that the policing of its scope and the manner of operation of political convention "does not lie within the constitutional remit of the judiciary, which is to protect the rule of law." On the Supreme Court's analysis the United Kingdom's constitution exists in a perpetual present. It has no past, and no future. Ultimately the United Kingdom constitution can, for the Supreme Court, be nothing more than a *description* of whatever United Kingdom Parliament feels like doing or permitting – the United Kingdom Government feels it can get away with – on any particular day.

Miller was essentially a case which was argued before, and decided by, the court on the basis of the *English Imperial* constitutional tradition forged in the Victorian age. In retrospect it might have been better for the Scottish and Welsh Governments not to have intervened in the *Miller* appeal, and for the *McCord* and *Agnew* reference not to have been heard with *Miller*. This would have allowed the *Miller* case to have been decided (as it had been before the (English) Divisional Court) on the proper basis of solely English constitutional tradition and history. In the Scottish constitutional tradition, previous case law is said to be binding not, as in English law, by reason of its authority, but because of the authority of its reasoning. *Miller* on devolution does not stand up to scrutiny on this standard. But, on the devolution aspects, it is a unanimous 11 judge decision of the highest court in the land. Unless the Supreme Court is going to make more of a habit of sitting in plenary session *en banc*, its decision in *Miller* constitutes the final and binding word on these matters. By closing off the possibility of, even the threat of, recourse to the courts as a means of resolving constitutional disputes between the devolved nations and the United Kingdom Parliament or Government, the judgment will, if anything, exacerbate political tensions between them. This judgment has made the political constitution of the devolved United Kingdom as a whole more unstable, more brittle, more fragile and more likely to break-up precisely because it denies the devolved nations' institutions any legal right to participate in the Brexit process.

The immediate political result of the Supreme Court's judgment on what it considered to be the main issue (of the necessity for Westminster legislation to trigger Brexit) has been the publication by the United Kingdom Government, and its introduction before the United Kingdom Parliament, of *The European Union (Notification of Withdrawal) Bill*. This, in the terminology of German constitutional law, is an *Ermächtigungsgestez* or an "Enabling Act". It consists of just one substantive sub-clause. This sub-clause provides for the United Kingdom Parliament to introduce into the United Kingdom constitution a new "leader principle" (the Germans always have a word for it) as follows:

> *"The Prime Minister may notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU."*

Thus does legal constitutionalism end – not with a bang, but a whimper.

SUGGESTED CITATION O'Neill, Aidan: *The Miller decision: Legal constitutionalism ends not with a bang, but a whimper, VerfBlog,* 2017/2/03, http://verfassungsblog.de/the-miller-decision-legal-constitutionalism-ends-not-with-a-bang-but-a-whimper/.